ALUMINEX (M) SDN. BHD. & ANOR.

v.

UNITED MALAYAN BANKING CORP. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-24-17-1989]
1 APRIL 1991

BANKING: *Trust Receipt - Debentures - Receivership - Ranking of creditors - Proceeds of sale not received - Effect of - Lodgment of debentures - Doctrine of following trust money or property - Companies Act 1965, s. 108*

The 2nd and 3rd defendants, D2 and D3 were joint main contractors for the construction of a building. In 1986 the 1st plaintiff P1 was appointed by D2 and D3 as sub-contractor for the design, supply and installation of glass curtain walling and frameless glazed screens for the said building.

P1 entered into a contract with MS for the supply of glass required for the job. The 1st defendant UMBC, granted a letter of credit/trust receipt facility for MS to purchase the glass whereby MS were obliged to receive and retain the proceeds of the sale of the glass to P1 as trustee for UMBC and were obliged by the terms of the trust receipt to keep such proceeds separate and apart from their other monies and to pay over the same to UMBC.

UMBC also required MS to assign to it the sub-contract with P1; as a result P1 absolutely assigned to UMBC its sub-contract and all monies due to it under the contract. D2 and D3 also provided UMBC with a letter of undertaking to pay the proceeds due to P1 under the contract, directly to UMBC.

In 1982, P1 had by a deed of debenture in favour the 2nd plaintiff, UAB, charged all its plant, equipment, machinery and motor vehicles and by way of floating charge all its undertakings and other properties and assets, movable and immovable.

Under the debenture, P1 further pledged not to create any further mortgage or debenture, in respect of any of its assets in priority or in *pari passu* with the debenture. P1 also undertook to assign the benefit of all existing and/or future contracts to be executed in favour of UAB. In 1984, P1 provided UAB with a second debenture which was supplemental to the first debenture.

In 1987, as there were amounts due and owing to UAB, the debentures were duly crystallized and receivers and managers, R & M, were appointed. When R & M learnt that under the said letter of undertaking given by D2 and D3 to UMBC and pursuant to the assignment by P1, monies has been paid to UMBC, they issued this originating summons wherein the plaintiffs sought a declaration that because the 2 debentures were duly lodged pursuant to s. 108 of the Companies Act and were duly registered, UMBC was deemed to have notice of the 2 debentures and that UMBC's interest was subject to UAB's.

UMBC conceded to the question of the notice but disputed UAB's contention that the interest of UMBC in the said assignment was subject to the interest of UAB as contained in the said 2 debentures in favour of UAB.

Held:

[1] Due to the issue of the trust receipt, UMBC had title to the glass which on release to MS was held by them in trust for UMBC. Any and all proceed of the sale receivable by MS has to be held by MS in trust for UMBC. However in this case MS was never paid for the glass. By the delivery of the glass there was completion of the sale, title in the glass had passed and as no payment was received by MS, MS did not hold anything in trust for UMBC.

[2] The doctrine of following trust money or trust property had no application here as firstly there was no payment received and secondly there was no fiduciary relationship between P1 and UMBC.

[3] As a result of the debentures, P1 could not properly assign its interest in the sub-contract without the written consent of UAB and as UMBC is deemed to have had notice of the debentures, their interest is subject to UAB's.

[Judgment for the plaintiff.]

Legislation referred to:
Companies Act 1965, s. 108

For the Plaintiffs - Karina Merican; M/s. Skrine & Co.
For the 1st Defendant - Juliana Solomon; M/s. Rashid & Lee

JUDGMENT

VC George J:

On 18 April 1986 Takenaka Komuten Co. Ltd. and Pembinaan Maluri Sdn. Bhd. (the 2nd and 3rd defendants herein) who jointly were the main contractors erecting the headquarters building for Bank Pembangunan Malaysia Bhd. appointed Aluminex (M) Sdn. Bhd., the 1st plaintiff, as the sub-contractor for the design, supply and installation of glass curtain walling and frameless glazed screens for the building. This sub-contract was worth some RM4,688,177. Aluminex in turn entered into a contract with one Meng Sing Glass Sdn. Bhd. for the supply of the required glass for the job. This supply contract was worth some RM2,300,000. Meng Sing were getting the glass from Korean sources. They needed financial assistance to buy the glass.

The United Malayan Banking Corporation Bhd. (UMBC) was prepared to finance Meng Sing. The facility granted has been referred to by UMBC as Letter of Credit/Trust Receipt (LC/TR) facility by which UMBC would provide to Meng Sing the funds necessary to purchase the glass from Korea. Meng Sing was to issue trust receipts in favour of the bank by the terms of which they would be deemed to hold the glass in trust for the bank. Meng Sing was allowed to sell the glass. They were however obliged to receive and retain the proceeds of the sale as trustees for the bank and they were obliged by the terms of the trust receipt to keep such proceeds separate and apart from their other monies and to pay over the same to the bank. By each of the trust receipts Meng Sing state that they agree that the bank is the owner of the glass and that in effecting the sale of the glass they act as agents for the bank.

UMBC had required, apart from the issue of trust receipts, some further security for granting the aforesaid facility to Meng Sing. They wanted an assignment in their favour of the Aluminex sub-contract. In UMBC's letter of offer to Meng Sing the bank states in respect of security:

Security:

> The above facility is to be secured against assignment of the proceeds of the sub-contract awarded to Aluminex (M) Sdn. Bhd. (Aluminex) valued at RM4,688,177 in favour of our bank. Aluminex is to open a collection account with us for this purpose.

It would appear that Aluminex decided to assist Meng Sing to obtain the LC/TR facility. On 16 October 1986 they became party to what is described as a "loan agreement cum assignment" which is exhibited herein as Ex. A-4 to encl. (2). By that document Aluminex purported to absolutely assign to UMBC Aluminex's said sub-contract including:

> all moneys which may now or hereafter become due and payable to (Aluminex) pursuant to and under the (sub-contact) and all benefits, rights and advantages therein and all arrangements and all certificates and documents ... which may be necessary to enable the bank to recover all the above said moneys or any instalments or parts thereof.

The effect of the assignment was to continue to obtain until the bank had been fully paid all money owing to it by Meng Sing under the facility. The main contractor also assisted by providing UMBC with a letter of undertaking to pay the proceeds of the Aluminex sub-contract directly into what has been referred to as Aluminex's "collection account" with UMBC. This was done pursuant to a requirement in UMBC's letter of offer to Meng Sing *viz*:

> Please take note that you are to obtain a Letter of Undertaking from the principal contractor, Takenaka Maluri Joint Venture to pay the proceeds of the contract directly to Aluminex (M) Sdn. Bhd.'s Collection account with us. The portion of the monies paid in respect of work done by your company, that is, 50% of the proceeds of the sub-contract awarded to Aluminex (M) Sdn. Bhd. is to be used to settle the above Letter of Credit/Trust Receipt facility.

In the event, UMBC provided the facility to Meng Sing, the Koreans delivered the glass, Meng Sing in turn delivered it to Aluminex and the glass was utilised by Aluminex in completing its obligations to the said main contractors to design supply and install the glass works. The glass has no doubt become a fixture of the completed Bank Pembangunan Headquarters building.

Now, earlier on 29 March 1982, in consideration of the United Asian Bank Bhd. (UAB), the 2nd plaintiff, granting Aluminex certain overdraft facilities, Aluminex had by a deed of debenture, charged in favour of UAB:

> by way of a 1st charge of all its plants, equipments, machinery and motor vehicles

and:

> by way of a floating 1st charge of all its undertakings and other properties and assets movable and immovable.

Clause 9(b) of the debenture provided that Aluminex:

> shall not have power save with the written consent of the bank to create any further mortgage, debenture (whether fixed or floating) charge, pledge or lien in respect of any of the assets of the company covered by this debenture ranking in priority to a *pari passu* with the debenture.

By clause 18 Aluminex irrevocable undertook:

> to assign the benefit of all existing and or future contracts to be executed by the company in favour of the bank; and towards this direction shall execute such relevant and/or other security documents as may be required by the bank from time to time.

On 21 March 1984, in consideration of UAB increasing the limit of the overdraft facility, Aluminex provided UAB with a second debenture which was supplemental to the earlier debenture. Again there was the usual fixed and floating charge covering the then existing assets and all future assets of the company to secure the repayment of the amounts overdrawn.

On 24 September 1987 there were amounts due and owing to UAB by Aluminex on the overdraft facility. The debentures were duly crystalised and receivers and managers were duly appointed at whose instance this originating summons was caused to be issued when the receivers and managers learnt that pursuant to the said letter of undertaking given by the main contractor to UMBC and pursuant to the said assignment by Aluminex of moneys payable to them in respect of their said sub-contract, the sum of RM285,811.88 payable to Aluminex as progressive payments in respect of the sub-contract (as set out in certificates 34 & 35) had been paid to UMBC. Now, the main contractors had by their said letter of undertaking undertaken "to remit all monies and payments now or hereafter become due to the sub-contract directly to you (UMBC) and that all cheques issued by us will be addressed as follows: United Malayan Banking Corporation Bhd. for account of Aluminex (M) Sdn. Bhd. - A/C No. 0235105268" and presumably the remittance was accordingly made to that account. In any event UMBC and UAB have agreed that UMBC will place the amount in a fixed deposit account pending what has turned out to be in effect the outcome of this originating summons.

By prayers (i) and (ii) of the originating summons the plaintiffs seek declarations to the effect that because the two debentures were duly lodged pursuant to s. 108 of the Companies Act for registration with the Registrar of Companies and were duly so registered, the 1st defendant UMBC is deemed to have notice of the said two debentures and their terms and conditions.

Learned Counsel for the UMBC helpfully and properly has conceded that there had been such due lodgment and registration and that accordingly the plaintiffs are entitled to the declarations sought by prayers (i) and (ii).

UMBC and their Counsel however dispute the plaintiffs' right to the declarations sought by prayer (iii), that is, that the interest of UMBC in the said assignment is subject to the interest of UAB as contained in the said two debentures in favour of UAB. There are other prayers which are consequential to the decision in respect of prayer (iii).

As has been seen, apart from the assignment by Aluminex of moneys payable under their sub-contract, UMBC had insisted on other measures to attempt to ensure the repayment of the moneys they had advanced to Meng Sing to obtain the glass that was eventually supplied to Aluminex - they had, as has been seen, required Meng Sing to issue trust receipts in respect of the consignments of glass and which Meng Sing had done in respect of all the glass that had been purchased from the Korean source.

Now, much was made by Counsel of the issue of the trust receipts and of the effect of such issue. J.R. Lingard in his *Bank Security Documents* succinctly explains the effect of trust receipts at para. 17.66:

> Bankers to whom goods are pledged often have to release them to the customer so that they can be manufactured or sold. This is done by a trust receipt procedure whereby the customer acknowledges that he holds the goods and the proceeds of sale on trust for the bank. It was held in *Lyolds Bank Ltd. v. Bank of America National Trust and Savings Association* that when a bank released goods to its customer by such a procedure for the purpose of sale it constitutes the customer a mercantile agent so that persons dealing with the customer in good

> faith will obtain a good title to the goods by the Factors Act 1889. This, of course, is the intention of all concerned in that the bank only look to the goods until they are disposed of and thereafter to the proceeds of sale which are expressed to be held in trust for it.

In the instant case, because of the issue of the trust receipts, UMBC had title to the glass which on release to Meng Sing was held by them in trust for UMBC. Meng Sing thereupon assuming the role of a mercantile agent of UMBC and in that capacity completed the sale of the glass to Aluminex by delivering to Aluminex the glass whereupon Aluminex obtained good title to the glass. Any and all proceeds of the sale of the glass receivable by Meng Sing has to be held by Meng Sing in trust for UMBC. The last sentence in that paragraph from Lingard bears repeating:

> This, of course, is the intention of all concerned in that the bank only looks to the goods until they are disposed of and thereafter to the proceeds of sale which are expressed to be held in trust for it.

However, Meng Sing was never paid for the glass. Accordingly there was nothing in their hands to hold in trust for UMBC or at all. Proceeds of sale is the payment received as a result of the sale. Until there was a payment in respect of the sale made there are no proceeds of sale. In the instant case no payment was made in respect of the sale of the glass to Meng Sing and as by the delivery of the glass there was completion of the sale, title in the glass had passed and as no payment therefore had been received by Meng Sing; Meng Sing did not hold anything in trust for UMBC.

It was contended by Counsel that UMBC was entitled to get at the money that should have been paid for the glass by invoking the doctrine of following trust money or trust property or that into which it had been converted. This doctrine has no application here because in the first place since payment was not received for the sale there was nothing held in trust and in any event the doctrine only applies where there was a fiduciary relationship between the parties. There was no such relationship between Aluminex and UMBC and accordingly the argument is misconceived.

In the face of the debentures with particular reference to clause 9(b) and 18 in the first and the equipollent clauses in the second, Aluminex could not properly assign its interest in the sub-contract without the written consent of UAB and because UMBC is deemed to have had notice of the debentures and of those clauses in particular they have to get behind UAB in the queue. The plaintiffs are entitled to the declarations sought by prayer (iii) of the originating summons and consequently the plaintiffs are entitled to the prayers (iv), (v), (vi), (vii) and (ix). There will be orders accordingly.

Also found at [1991] 2 CLJ 1347